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DEC 29 1972
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-834

ROY HUBBARD, ET AL.,
Petitioners,

VS.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Jurisdictional Questions Raised 2

History of This Litigation 2-4

Reasons for Refusing the Writ 5-9

Petitioners Are Bound by the Judgments of the State Appellate Court 5-6

The State Court Proceedings Should Not Have Been Enjoined 6-8

Ammerman Was Not Bound by the Erroneous Findings of the State Trial Court 8-9

The Claim That Ammerman's Counsel Stipulated on Jurisdiction 9

Conclusion 10

Certificate of Service 11

TABLE OF CASES CITED

Ammerman v. *Collins*, 464 S.W.2d 184 (Texarkana Civ. App. 1971) 3

Atlantic Coast Line R. Co. v. *Brotherhood of Loc. Eng.*, 398 U.S. 281 (1970) 5

Benavides v. *Atkins*, 132 Tex. 1, 120 S.W.2d 415 (1938) 9

Collins v. *Ammerman*, 459 S.W.2d 891 (Texarkana Civ. App. 1970) 2, 3

Coppedge v. *Clinton*, 72 F.2d 531 (10th Cir. 1934) 8

Essanay Film Mfg. Co. v. *Kane*, 258 U.S. 358 (1922) 5

Hanna v. *Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960) 5

Iles v. *Walker*, 132 Tex. 6, 120 S.W.2d 418 (1938) 8-9

Jones v. *Medlock*, 180 F.2d 658 (10th Cir. 1950), cert. den., 340 U.S. 819 (1950) 5

Mitchum v. *Foster*, ... U.S. ....., 32 L.Ed.2d 705 (1972) 6
Parr v. *Cantu*, 161 Tex. 296, 340 S.W.2d 481 (1961) 5
Polk v. *Davidson*, 145 Tex. 200, 196 S.W.2d 632 (1946) 8
Ray v. *Hasley*, 214 F.2d 366 (5th Cir. 1954) 8
Silent Automatic Sales Corp. v. *Stayton*, 45 F.2d 476 (8th Cir. 1931) 8
Sterling v. *Ferguson*, 122 Tex. 122, 53 S.W.2d 753 (1932) 9
Taylor v. *Nealon*, 132 Tex. 60, 120 S.W.2d 586 (1938) 8
Thomason v. *Seale*, 122 Tex. 160, 53 S.W.2d 764 (1932) 8
Warriner v. *Fink*, 307 F.2d 933 (5th Cir. 1962), cert. den., 372 U.S. 943 (1963) 5
Younger v. *Harris*, 401 U.S. 37 (1971) 6

STATUTES CITED

28 U.S.C., § 1257 ..... 2, 4, 5, 7, 10
28 U.S.C., § 2281 7
Article 13.30, Texas Election Code 2, 5, 7

OTHER

49 C.J.S., § 343 7

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TO SAID HONORABLE COURT:

The Court of Appeals correctly held that the United States District Court should not have enjoined the enforcement of final judgments which had been rendered by state courts adverse to Collins and his supporters in a primary election contest filed by Collins in a Texas court pursuant to a Texas statute. The factual background of the controversy is fully stated in the opinion of the Court of Appeals, Appendix pp. 37-69.

JURISDICTIONAL QUESTIONS RAISED

1. Can a party who instituted a state court proceeding and who suffered two adverse judgments in the highest state court having jurisdiction of that proceeding forego his right to have those judgments reviewed by certiorari under 28 U.S.C., § 1257 and instead obtain an injunction against the enforcement of such judgments in an independent action in a United States District Court?

2. Can, or should, the Supreme Court review such state court judgments which were rendered on October 6, 1970 and March 9, 1971 and which the petitioners allowed to become final?

HISTORY OF THIS LITIGATION

Before any action was commenced in a federal court, Collins filed and tried a primary election contest in a Texas court under provisions of the Texas Election Code.[1] In the trial of the contest in the state court, numerous errors were committed by the state trial court at the urging and insistence of Collins, and over the objection of Ammerman, and, at the urging, prayer and insistence of Collins, the state trial court ordered a new primary election, even though it had no authority to do so under state law.[2] Collins and Ammerman perfected timely appeals from such judgment to the Texas Court of Civil Appeals at Texarkana,

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1. Article 13.30 of the Texas Election Code, which is quoted in full in the opinion of the Court of Appeals, Appendix pp. 38-41.

2. This was so held by the Texas Court of Civil Appeals, *Collins v. Ammerman*, 459 S.W.2d 891, 894 (Texarkana Civ. App. 1970); Defendants' Exhibit 2, Transcript of Hearing on Permanent Injunction, pp. 50-53; Appendix in Court of Appeals, p. 25.

with Collins changing his position on appeal and contending that the state trial court should have declared him the winner rather than ordering a new election.[3] Collins' supporters (who later filed the action in the United States District Court) intervened in the election contest, were ordered stricken by the state trial court, and did not appeal from that order or the subsequent decision of the state trial court.

In an opinion rendered on October 6, 1970, the state appellate court entered judgment adverse to Collins, taxed the cost of the trial and appeals against Collins, and remanded the contest to the state trial court for further proceedings.[4]

After further proceedings in the state trial court, which resulted in a judgment favorable to Collins except as to taxation of costs in accordance with the earlier decision of the state appellate court, both Collins and Ammerman perfected new appeals to the Texas Court of Civil Appeals, which, on March 9, 1971, rendered judgment dismissing the contest and taxing the costs against Collins.[5] Contrary to Collins' claim of irregularities in the election, *such judgment expressly found that there was no violation of any federal or state law*[6] and left in force Ammerman's certification as the Democratic nominee for County Judge of Harrison County, Texas.

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3. This was emphasized by the Court of Appeals in its opinion, Appendix, p. 42.

4. *Collins* v. *Ammerman*, 459 S.W.2d 891 (Texarkana Civ. App. 1970); Appendix in Court of Appeals, p. 25.

5. *Ammerman* v. *Collins*, 464 S.W.2d 184 (Texarkana Civ. App. 1971); Appendix, p. 26.

6. *Ammerman* v. *Collins*, 464 S.W.2d 184, 189 (Texarkana Civ. App. 1971); Appendix, p. 34.

On both appeals to the Court of Civil Appeals, Ammerman argued that the state trial court had erroneously declared void 31 absentee ballots for Ammerman for non-substantial reasons, such as the rendition of needed assistance to illiterate voters (Appendix in Court of Appeals, p. 21, and p. 42). These 31 ballots were legal under prior court decisions and, although these ballots were not expressly discussed in the opinion of the Court of Civil Appeals, the finding that there was no violation of any federal or state law was an implied adjudication in favor of Ammerman. Therefore, Ammerman contends that he was still the winner of the election by a majority of 16 votes.

Neither Collins nor the sureties on his appeal bonds in the state courts, nor his supporters who intervened in the contest and later filed this action, petitioned the Supreme Court of the United States for a writ of certiorari to review such state court judgments as allowed by 28 U.S.C., § 1257. Instead, Collins and his supporters prosecuted an independent action in the United States District Court to set aside and enjoin the enforcement of such judgments.[7]

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7. Roy Hubbard et al., plaintiffs, and James S. Collins, Intervenor vs. Jim Ammerman, et al., defendants, Civil Action No. 1472, in the United States District Court for the Eastern District of Texas, Marshall Division. The judgment of that action, granting the relief sought by Collins and his supporters (Appendix, pp. 75-80) was reversed by the judgment of the Court of Appeals (Appendix, pp. 81-82) complained of by petitioners in their Petition for Writ of Certiorari.

REASONS FOR REFUSING THE WRIT

Petitioners Are Bound by the Judgments of the State Appellate Court

The October 6, 1970 and March 9, 1971 judgments of the Texas Court of Civil Appeals were final judgments of the highest court of the State of Texas having jurisdiction of the primary election contest filed by Collins. *Parr* v. *Cantu*, 161 Tex. 296, 340 S.W.2d 481 (1961).[8] The remedy that Collins and his sureties, as well as his supporters who had intervened in the contest in the state court, should have pursued if they desired a federal review of the state court proceedings was that provided by 28 U.S.C., § 1257.

Lower federal courts possess no power whatsoever to sit in direct review of state court decisions. *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Eng.*, 398 U.S. 281 (1970). Judgments of state courts may be reviewed or nullified only by the Supreme Court of the United States and not by federal district courts. *Essanay Film Mfg. Co.* v. *Kane*, 258 U.S. 358 (1922); *Warriner* v. *Fink*, 307 F.2d 933 (5th Cir. 1962), cert. den., 372 U.S. 943 (1963); *Hanna* v. *Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960), cert. den., 365 U.S. 838 (1961); *Jones* v. *Medlock*, 180 F.2d 658 (10th Cir. 1950), cert. den., 340 U.S. 819 (1950).

Having failed to file a petition for writ of certiorari for review of the state court judgments, Collins, his sureties, and his supporters allowed such judgments (taxing Collins and his sureties with the costs in the state courts and leaving the certification of Ammerman in force) to be-

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8. Art. 13.30 (12) of the Texas Election Code provides: "The Supreme Court of Texas shall have no jurisdiction to review any election contest filed under this Act by writ of error, certified question, or any other manner."

come final. They are now bound by such judgments under federal law as well as the law of the State of Texas.

The State Court Proceedings Should Not Have Been Enjoined

The Order Granting Preliminary Injunction entered by the United States District Court on September 29, 1970 enjoined the state election officials from holding an election for the office of County Judge of Harrison County, Texas "until further Order of this Court" and enjoined "each and every voter and elector participating in the General Election to be held in November, 1970 - - - from writing in the name of the office of County Judge of Harrison County, Texas, and the name of any person for such office on the ballot of the General Election of November, 1970." (Appendix, pp. 30-31). The broad scope of this preliminary injunction, as well as the subsequent injunctions issued by the United States District Court, was calculated to deprive the state courts of the power and means of enforcing any final judgment which they might render in the election contest and resulted in the "head-on collision" between the United States District Court and the Texas Court of Civil Appeals described in the opinion of the Court of Appeals (Appendix, p. 38). The permanent injunction against enforcement of the judgments of the Court of Civil Appeals is without precedent so far as we can determine.

In *Mitchum* v. *Foster*, ... U.S. ....., 32 L.Ed.2d 705 (1972) the Court restated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances", previously declared in *Younger* v. *Harris*, 401 U.S. 37 (1971), and emphasized:

> *"we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.* These principles, in the context of state criminal prosecutions, were canvassed at length last term in Younger v. Harris, 401 U.S. 37, and its companion cases. These are principles that have been emphasized by this Court many times in the past." (Emphasis added, numerous cited cases omitted)

The principles of equity do not entitle a litigant to injunctive relief from a judgment if he has failed to exhaust every legal remedy available to him.[9] In this case, the record affirmatively shows the petitioners failed to pursue or exhaust the legal remedy afforded them by 28 U.S.C., § 1257;[10] therefore, even absent other considerations dictating against the issuance of an injunction, the petitioners failed to establish any basis for injunctive relief from the state court judgments.

The injunctions, if intended to avoid application of the "mootness doctrine" prescribed by Article 13.30 (12) of the Texas Election Code, were improperly granted because 28 U.S.C., § 2281 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the

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9. No citation seems necessary for this basic rule of equity but numerous cases are cited in 49 C.J.S., § 343.

10. Transcript of Hearing on Permanent Injunction, p. 52.

ground of the unconstitutionality of such statute *unless the application therefor is heard and determined by a district court of three judges* under section 2284 of this title." (Emphasis added)

Only one judge heard and determined the applications for the injunctions.

Ammerman Was Not Bound by the Erroneous Findings of the State Trial Court

Contrary to the conclusion of the United States District Court that Ammerman was collaterally estopped by some of the findings of the state trial court, the judgments of the state trial court, entered on July 27 and October 12, 1970, were rendered of no force and effect by timely appeals therefrom which were perfected by both Collins and Ammerman. Whether the judgment of a state court is final, conclusive or binding must be determined by the law of the state under whose jurisdiction such judgment was rendered and the law of the State under whose jurisdiction a judgment was rendered is binding upon federal courts as to the status of a state court judgment with respect to its finality pending or following an appeal therefrom. *Ray* v. *Hasley,* 214 F.2d 366 (5th Cir. 1954); *Silent Automatic Sales Corp.* v. *Stayton,* 45 F.2d 476 (8th Cir. 1931); and *Coppedge* v. *Clinton,* 72 F.2d 531 (10th Cir. 1934). Under numerous decisions of the courts of the State of Texas, the judgment rendered by the trial court in a primary election contest is of no force and effect, confers no right, and is unenforceable if a timely appeal is perfected, until and unless it is affirmed on appeal. *Thomason* v. *Seale,* 122 Tex. 160, 53 S.W.2d 764 (1932); *Taylor* v. *Nealon,* 132 Tex. 60, 120 S.W.2d 586 (1938); *Polk* v. *Davidson,* 145 Tex. 200, 196 S.W. 2d 632 (1946); *Iles* v. *Walker,* 132 Tex. 6, 120 S.W.2d 418

(1938); *Sterling* v. *Ferguson*, 122 Tex. 122, 53 S.W.2d 753 (1932); and *Benavides* v. *Atkins*, 132 Tex. 1, 120 S.W.2d 415 (1938).

The Claim That Ammerman's Counsel Stipulated on Jurisdiction

At page 5 of their Petition for Writ of Certiorari, petitioners apparently argue that Ammerman's counsel agreed or stipulated that the United States District Court had jurisdiction to enjoin the holding of the General Election. The Appendix Accompanying Petition for Certiorari (prepared solely at the request of petitioners) does not contain a full transcript of the Hearing on Motion to Dissolve Preliminary Injunction. The record in this entire proceeding, including Ammerman's Motion to Dismiss (R. pp. 27-29), Ammerman's Original Answer (R. pp. 30-47), Ammerman's Original Answer to Collins' Plea of Intervention (R. pp. 148-157), and the Pre-Trial Order in the United States District Court (Appendix in the Court of Appeals, pp. 88-117), as well as the transcript of all of the hearings in the District Court will show, without question, that at all times Ammerman consistently maintained the position that the District Court had no jurisdiction to issue an injunction or grant the relief prayed for by the original plaintiffs or the intervenor.

The import of and the point conveyed by the statement of Ammerman's counsel quoted by petitioners is that *if* the United States District Court had jurisdiction, which Ammerman denied, it would not lose jurisdiction by denying plaintiffs' motion on October 13, 1970.

CONCLUSION

The Petition for Writ of Certiorari filed with the Court for review of the judgment of the United States Court of Appeals is a belated and unauthorized attempt to obtain a review of the judgments of the state appellate court, which were final and no longer reviewable more than a year before the filing of such petition.

Had the petitioners desired to challenge the constitutionality of the "mootness doctrine", they should have pursued the remedy afforded to them by 28 U.S.C., § 1257. It is not reviewable in this proceeding.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By: .....
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Petition for Writ of Certiorari was this the ..... day of December, 1972, placed in the United States Mail, postage prepaid to Mr. Earl Sharp, P. O. Box 3106, Longview, Texas 75601, Mr. Franklin Jones, P. O. Drawer 1249, Marshall, Texas 75670, Attorneys of Record for Petitioners, and Mr. Austin C. Bray, Jr., Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas.

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